Supreme Court, U.S.
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No. 96-215

In The

Supreme Court of the United States

October Term, 1995

STANLEY E. REED,

Petitioner,

vs.

CHEVRON PIPE LINE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This appeal presents the following issues:

I. Should the Court grant a *writ of certiorari* to review established Supreme Court precedent holding that appellate courts may, consistent with the Seventh Amendment, reverse a trial court's denial of a motion for judgment as a matter of law and render a judgment contrary to the verdict?

II. Should the Court grant a *writ of certiorari* to review settled case law by this Court establishing that appellate courts review such orders as issues of law?

STATEMENT OF INTERESTED PARTIES

Defendant/Respondent

Chevron Pipe Line Company

Plaintiff/Petitioner

Stanley E. Reed

Other Interested Parties

Parent of Defendant/Respondent

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RULE INVOLVED

Petitioner adequately quotes the second clause of the Seventh Amendment, the only constitutional provision at issue here.

This case also involves Rule 50, FED.R.CIV.P., which provides, *inter alia*:

> **Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings**
>
> **(a) Judgment as a Matter of Law.**
>
> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. . . .
>
> **(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the

legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) . . . .

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF THE CASE

Stanley Reed was terminated by his former employer, Chevron Pipe Line Company ("CPL"), following an extensive investigation into allegations by several co-employees that he was harassing and intimidating female subordinates. CPL referred Reed to the Employee Assistance Program for evaluation and counseling but determined that upon returning to work, he engaged in retaliation and was not willing to cooperate with the counselor. CPL then terminated him. (Petitioner's Appendix ("Pet. App."), at A-4 - A-8.)

Reed sued alleging that CPL had denied him Sixth and Fourteenth Amendment due process in its investigation, had sexually harassed him, was guilty of sex discrimination, had violated the Age Discrimination in Employment Act ("ADEA") and caused him to defame himself.[1] The due process and sexual harassment claims were dismissed on summary judgment. A jury trial was held on the remaining claims.

At the close of Reed's evidence, CPL moved for judgment as a matter of law under Rule 50(a), FED.R.CIV.P., against all of Plaintiff's remaining claims, arguing that Reed had failed to offer legally sufficient evidence of sex discrimination, age discrimination, or actual malice. The motion was granted on the sex discrimination claim but denied on the ADEA and self-

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1. Reed was told he was being terminated for sexual harassment; he claimed the real reason was his age. The theory of self-publication defamation is based on the concept that the former employer is liable for damages if it gives the employee a false and defamatory reason for his termination because it is reasonably foreseeable that he would be required to tell prospective employers the reason for his termination. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 311 (5th Cir. 1995). The Supreme Court of Texas has not resolved the split in the courts of appeal as to whether Texas recognizes this tort. (Pet. App., at A-12, n.2.)

defamation claims. At the close of all of the evidence, CPL renewed its motion for judgment as a matter of law. The district court ruled that, while the jury would be instructed that a qualified privilege applied to any communications by CPL to Reed or by Reed to prospective employers[2], the motion for judgment was denied. The jury found in favor of Reed on both claims; CPL renewed its motion under under Rule 50(b).

The district court granted CPL's motion on the ADEA violation holding that there was insufficient evidence as a matter of law to meet even the preponderance standard applicable to that claim. However, the district court denied the motion on the self-defamation claim and entered judgment in favor of Reed. (Respondent's Appendix ("Resp. App."), appended hereto.)

CPL appealed contending, *inter alia*, that there was insufficient evidence as a matter of law from which a reasonable jury could conclude that Plaintiff had clearly and convincingly proven that CPL acted with actual malice and the trial court erred in denying its motion for judgment as a matter of law. Reed filed no cross-appeal and did not request a new trial in the event his judgment was reversed. Instead, he argued only that the jury verdict must be upheld. The court of appeals, in an unpublished opinion, held that there was insufficient evidence as a matter of law, to support the self-defamation claim, reversed the judgment

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2. The Fifth Circuit has held that the *"New York Times v. Sullivan*, 376 U.S. 254 (1964) standard of actual malice would be applied to self-defamation claims in Texas, if it were to recognize such. *Carr v. Brasher*, 776 S.W. 2d 567, 571 (Tex. 1989). So long as the people who told Reed why he was being terminated neither knew the stated reasons were false nor entertained serious doubt as to their truth, the qualified privilege prevails. *See Schauer v. Memorial Care Systems*, 856 S.W. 2d 437, 449 (Tex. App.—Houston [1st Dist.] 1993, no writ). Plaintiff's burden of proof on these issues is "clear and convincing." *Duffy*, 44 F.3d at 313, citing to *Howell v. Hecht*, 821 S.W. 2d 627, 630 (Tex. App.—Dallas 1991, writ denied).

in favor of Plaintiff and rendered judgment in favor of CPL.[3] Reed moved for reconsideration but even then did not request a new trial under Rule 50(d).

Reed now petitions this Court for a *writ of certiorari*, claiming that the actions of the court of appeals violated the Seventh Amendment and that the court erred in failing to apply an abuse of discretion standard in reviewing the denial of the motion for judgment as a matter of law.

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3. The Fifth Circuit noted that: "The actual malice analysis is a subjective standard that centers on the state of mind of the person or persons making the allegedly defamatory statements. . . . [T]he relevant persons for that inquiry are the people who terminated Reed. . . . Any allegedly defamatory statements made by them were entitled to a presumption of good faith and lack of malice . . . Reed offered no direct evidence on the state of mind of any of these individuals. Instead, he argued below that he was not psychologically dysfunctional, that he should have been accorded fictitious "due process" rights, that he was unfairly treated by CPL and that he was discriminated against on the basis of age. In other words, *he misapprehended the legal theory of defamation and failed to present direct evidence on a critical element of a defamation claim brought under Texas law: actual malice.*" (Pet. App., at A-20-21) (citations omitted) (emphasis added). As to Reed's argument that the missing element might have been supplied if the jury disbelieved the testimony of the relevant CPL employees that they believed that the stated grounds for his termination were true, the Fifth Circuit stated: "[I]t is well-established that 'discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.' " *Id.* at A-25. Similarly, the Fifth Circuit disposed of Reed's speculation that the jury could have concluded that the ulterior motive for his termination was age discrimination, noting that the jury was not instructed on this theory, *id.* at A-26, n. 6, and that the trial court had ruled that there was not even sufficient evidence under the preponderance standard to support such, a ruling Reed did not challenge on appeal. *Id.* at A-26.

REASONS FOR DENYING THE WRIT

I.

THRRE IS NO REASON TO GRANT A *WRIT OF CERTIORARI* TO REVIEW ESTABLISHED SUPREME COURT PRECEDENT HOLDING THAT APPELLATE COURTS MAY, CONSISTENT WITH THE SEVENTH AMENDMENT, REVERSE A TRIAL COURT'S DENIAL OF A MOTION FOR JUDGMENT AS A MATTER OF LAW AND RENDER A JUDGMENT CONTRARY TO THE VERDICT.

The essence of Petitioner's argument is that: "[t]his court has never held that a Court of Appeals may, consistent with the Seventh Amendment, review a judgment entered in a Trial Court on the basis that the evidence . . . was insufficient to support the verdict and judgment." (Petition for Writ of Cert., at 5.) Apparently petitioner is not aware of *Neely v. Martin K. EBY Construction Co.*, 386 U.S. 317 (1967), which twenty-nine years ago held just that and also held that if a trial court erred in denying a motion for judgment as a matter of law, the appellate court could also direct entry of a judgment contrary to the verdict.

The procedural backgrounds in *Neely* and this case are very similar. In *Neely*, plaintiff sought damages for wrongful death. At the close of plaintiff's evidence and again at the close of all the evidence, defendant moved for a directed verdict. The trial judge denied both motions and submitted the case to the jury, which returned a verdict for plaintiff. Defendant then moved for judgment *n.o.v.* or, in the alternative, for a new trial in accordance with Rule 50(b). The trial court denied the motion and entered judgment for plaintiff on the jury's verdict. Defendant appealed the denial of its motion for judgment n.o.v.

The Seventh Circuit held that the evidence at trial was legally insufficient to establish either negligence or proximate causation and reversed the judgment with instructions to the district court to dismiss the action. Plaintiff sought a *writ of certiorari*, questioning the power of the court of appeals, consistent with the 1963 amendments to Rule 50 and the Seventh Amendment, to direct the trial court to dismiss the action. *Id.* at 319-20.

The Court in *Neely* upheld precisely what was done here by the Fifth Circuit:

> Under Rule 50(b), if a party moves for a directed verdict at the close of the evidence and if the trial judge elects to send the case to the jury, the judge is "deemed" to have reserved decision on the motion. If the jury returns a contrary verdict, the party may within 10 days move to have judgment entered in accordance with his motion for directed verdict. This procedure is consistent with decisions of this Court rendered prior to the adoption of the Federal Rules in 1938. Compare Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 55 S. Ct. 890, 79 L. Ed 1636, with Slocum v. New York Life Ins. Co., 228 U.S. 364, 33 S. Ct. 523, 57 L. Ed. 879, and Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 57 S. Ct. 809, 81 L. Ed. 1177. And it is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147.
>
> The question here is whether the Court of

> Appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.* See Baltimore & Carolina Line, Inc. v. Redman, supra. Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n.o.v.* on appeal. Section 2106 of Title 28 provides that,
>
> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C.A. § 2106.
>
> See Bryan v. United States, 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335.

Id. at 321-22.

The balance of the discussion in *Neely* involved the question of alternative requests under Rule 50(d) for new trial in lieu of entry of an adverse judgment as a matter of law. Since plaintiff in *Neely* did not ask either the trial court or the court of appeal for a new trial in lieu of an adverse judgment, the Supreme Court held that it would not review that issue. *Neely*, 386 U.S. at 330. Reed is in the same shoes, as he never requested a new trial or suggested any grounds therefor in lieu of an adverse judgment.

On at least two occasions, the Supreme Court has reversed courts of appeals' affirmance of judgments and itself remanded the causes to the district court with instructions to enter judgment n.o.v. upon finding no legally sufficient evidence to support the judgment. *See Chinoweth v. Lessee of Haskell*, 28 U.S. (3 Pet.) 92 (1830); and *New York, N.H. & H.R. Co. v. Henagan*, 364 U.S. 441 (1960).

Neely relied on *Baltimore & Carolina v. Redman*, 295 U.S. 654 (1935), in which the Court held that at common law it was recognized that, where the issue of the legal insufficiency of the evidence had been properly reserved, judgment could be entered contrary to the jury verdict:

> At common law there was a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be essential by the ruling under the reservation, such as nonsuiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the

> jury had given a verdict to the other or making other essential adjustments.

Redman, 295 U.S. at 658-59.

The Court observed that whatever may have been the origin or theoretical basis of this practice, it undoubtedly was well established when the Seventh Amendment was adopted and, "therefore, must be regarded as a part of the common law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that amendment." *Redman*, 295 U.S. at 660. The Court in *Redman* held that, where the case has been submitted to the jury subject to a reservation of the issue of the legal insufficiency of the evidence, then a judgment can be entered contrary to the jury verdict, consistent with the Seventh Amendment. *Id.* at 660-61.

The Federal Rules of Civil Procedure adopted two years after *Redman*, included Rule 50 which, with minor procedural modifications, adopted the common law procedure recognized in *Redman*.[4] *See* 5A JAMES W. MOORE *et al.*, MOORE'S FEDERAL PRACTICE ¶ 50.07[1] p. 72 (2d ed. 1996). Rule 50(b) added a mechanism to replace the express reservation in *Redman* and to avoid problems discussed there when the trial court did not expressly reserve its decision. *See* Advisory Committee Notes, 1937 Adoption, Notes to Subdivisions (a) and (b).

None of the cases cited by Reed arose from a properly preserved motion for judgment as a matter of law. Instead, either they were decided well before *Redman* or they dealt with motions for new trial, which have an entirely different theoretical basis both in the trial courts and on appeal. His citations are, therefore, irrelevant.

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4. The constitutionality of Rule 50 is well settled. 5A MOORE'S FEDERAL PRACTICE ¶ 50.07 [1], p. 73 (citing to *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940); *Berry v. United States*, 312 U.S. 450 (1941)); and 9A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d §2522.

It has clearly been recognized by this Court for over 60 years that the appellate courts, upon finding error in the denial of a motion for judgment as a matter of law, can reverse and order that judgment be entered contrary to the verdict of the jury. There is no reason to grant *certiorari* to revisit this well settled area of law.

II.

THERE IS NO REASON TO GRANT A *WRIT OF CERTIORARI* TO REVIEW SETTLED CASE LAW BY THIS COURT ESTABLISHING THAT APPELLATE COURTS REVIEW SUCH ORDERS AS ISSUES OF LAW.

A. Petitioner Failed To Preserve This Issue

Reed asserts for the first time in his petition for *writ of certiorari* that an abuse of discretion standard applies when an appellate court reviews a trial court's denial of a motion for judgment as a matter of law under Rule 50. The Court should decline to hear this issue never presented to the court of appeal.

B. Issues of Law Are Reviewed *De Novo*

It is not the trial court's exercise of discretion which is at issue when the appellate courts review the denial of a motion for judgment as a matter of law. Rather, the issue is one of law — was sufficient evidence presented such that a reasonable jury could find for that party on that issue. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); and Rule 50(a)(1). Because the appellate courts are reviewing issues of law, deference to the trial court is not given. *See* cases cited at n. 5, *infra*. Reed confuses motions for new trial with motions for judgment as a matter of law.

In *New York, N.H. & H.R. Co. v. Henagan*, 364 U.S. 441 (1960), this Court reviewed the affirmance by the First Circuit of the denial of a motion for judgment n.o.v. Upon finding no legally sufficient evidence to support the verdict, the Court itself reversed and remanded to the district court with instructions that judgment n.o.v. be entered for defendant. *Id.* at 442. In doing so, the Court reviewed the decision by the trial and appellate courts on the same standard as did the trial court — was there a legally sufficient evidentiary basis for a reasonable jury to find facts necessary to support the verdict? *See also Chinoweth v. Lessee of Haskell*, 28 U.S. (3 Pet.) 92 (1830); and *Redman*, 295 U.S. at 695. No deference was given to the trial court (or to the court of appeal for that matter) on this issue of law.

It is uniformly held among the circuits that a trial court's ruling on a motion for judgment as a matter of law is reviewed *de novo*, as an issue of law.[5] In footnote 5 to the Fifth Circuit's opinion in *Reed*, the standard employed by this Court for determining the sufficiency of evidence of actual malice in a *New York Times* case is quoted from *Anderson*, 477 U.S. at 255. That standard is:

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5. *See Sullivan v. National Football League*, 34 F.3d 1096, 1091 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1252 (1995); *E.E.O.C. v. Ethan Allen, Inc.*, 44 F.3d 116, 119 (2nd Cir. 1994); *McDaniels v. Flick*, 59 F.3d 446, 453 (3rd Cir. 1995); *City Nat. Bank v. American Commonwealth Finan. Corp.*, 801 F.2d 714, 717 (4th Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987); *London v. MAC Corp. of America*, 44 F.3d 316, 318 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 99 (1995); *Snyder v. Ag Trucking, Inc.*, 57 F.3d 484 (6th Cir. 1995); *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 343 (7th Cir. 1995); *Commercial Property Invs., Inc. v. Quality Inns Int'l, Inc.*, 61 F.3d 639, 644 (8th Cir. 1995); *Large v. Penn Mut. Life Ins. Co.*, 843 F.2d 1175, 1181 (9th Cir. 1988); *Connett v. Justus Enterprises of Kansas, Inc.*, 68 F.3d 382, 384 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1018 (1996); *Beckwith v. City of Daytona Beach Shores, Fla.*, 58 F.3d 1554, 1561 (11th Cir. 1995); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 975 (Fed.Cir. 1995), *aff'd*, 116 S. Ct. 1384 (1996); *Calloway v. Central Charge Serv.*, 440 F.2d 287, 289 (D.C. Cir. 1971).

> In sum, we conclude that the determination of *whether a given factual dispute requires submission to a jury* must be guided by the substantive evidentiary standards that apply to the case. *This is true at both the directed verdict and summary judgment stages.* Consequently, where the New York Times "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not. (emphasis added).

In *Anderson*, this Court held that the judge must ask whether a fair minded jury could return a verdict for the plaintiff on the evidence presented. *Id.* at 254-55. That standard is embodied in Rule 50(a)(1).[6]

The Fifth Circuit correctly identified the only issue

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6. " . . . If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party. . . . " Rule 50(a)(1).

presented on appeal here: ". . . whether Reed presented evidence sufficient to constitute clear and convincing proof that CPL acted with actual malice." (Pet. App., at A-19.) Finding that, "[t]he evidence offered by Reed *did not even approach* clear and convincing proof of actual malice," (Pet. App., at A-29) the Fifth Circuit reversed and rendered.[7] (emphasis added).

C. The Cases Cited by Reed Are of No Help to Him

Reed's reliance on *Gasperini v. Center for Humanities, Inc.*, __ U.S.__, 116 S. Ct. 2211 (1996), in arguing for an abuse of discretion standard is misplaced. The Court in *Gasperini*, a diversity action, dealt with issues of federalism in reviewing the disposition of a motion under a New York statute for new trial due to excessive damage.*Gasparini* had nothing to do with the standard of review of a trial court's denial of a motion for judgment as a matter of law. *Gasperini* is irrelevant.

Reed's attempt to rely on *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), is similarly misplaced.[8] That Title VII discriminationcase does not support the notion that legally

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7. Moreover, the Court observed that "To the contrary, the record causes us seriously to doubt that CPL's stated grounds for termination were anything but true. The record certainly prevents us from seriously entertaining either the notion that Kinnear, Williams, Brown, or Suminski personally disbelieved that Reed had engaged in sexual harassment and improper conduct, or the notion that they had personally disbelieved that Reed was being fired for those reasons." (Pet. App., at A-29).

8. There are a number of distinctions between *St. Mary's* and this case: (1) *St. Mary's* is a Title VII discrimination claim, this is a common law defamation claim; (2) plaintiff in *St. Mary's* established a *prima facie* discrimination claim, Reed did not (Resp. App., at 2a); and (3) the burden of proof in *St. Mary's* was by a preponderance of the evidence, but in a *New York Times* defamation case such as this, plaintiff must prove malice with clear and convincing evidence.

sufficient evidence was presented in *Reed* to support the jury's finding of actual malice. To the contrary, *St. Mary's* is consistent with the result here.

In *St. Mary's*, the Court held that where a Title VII plaintiff has established a *prima facie* case, the burden of going forward shifts to defendant to present evidence of a non-discriminatory reason for termination. Upon presenting such, the presumption vanishes. The burden of proof remains, however, at all times on plaintiff. *Id.* at 506-507. The Court reversed the Eighth Circuit's ruling that upon the trial court's finding that it disbelieved defendant's explanation of a non-discriminatory basis for termination, together with the facts which gave rise to the *prima facie* case, judgment *must* be entered for plaintiff. *Id.* at 505. While holding in the language quoted by Reed that the evidence which created the *prima facie* case, together with disbelief of defendant's proffered non-discriminatory explanation *may* be sufficient to support a judgment for plaintiff, the Court emphasized that the trier must still conclude that plaintiff has proven that he was discriminated against: "it is not enough [for the fact finder] in other words, to disbelieve the employer; the fact finder must believe Plaintiff's explanation of intentional discrimination." *Id.* at 519.

This Court certainly did not hold in St. Mary's that a failed *prima facie* case, together with speculation that the jury may have disbelieved the employer's explanation, would satisfy even a preponderance of the evidence burden, much less the burden to prove actual malice with clear and convincing evidence.[9] As held by the Fifth Circuit in *Reed*, a vacuum left by the trier's

9. The District Court found "as a matter of law . . . the Plaintiff has not proven that Chevron Pipe Line violated the Age Discrimination in Employment Act nor has the Plaintiff proven that he was a victim of age discrimination on the part of Chevron Pipe Line." (Resp. App., at 1a-6a) Plaintiff never challenged this ruling by the District Court.

disbelief of defendant's explanation is not sufficient. (Pet. App., at A-25 and A-28-29.) Plaintiff must still prove the affirmative; Reed did not.

This Court has repeatedly recognized that Rule 50 motions raise issues of law and are reviewed on that basis. They are not within the discretion of the trial court and are not reviewed for abuse of discretion. No issue exists worthy of a *writ of certiorari.*

CONCLUSION

Reed's petition presents no grounds for issuance of a *writ of certiorari.* The law in this area has long been settled, there are no conflicts among the circuits and no reason has been advanced by Reed for reconsidering any of these areas. Therefore, the petition for *writ of certiorari* should be denied.

Respectfully submitted:

September 6, 1996

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RESPONDENT'S APPENDIX — ORDER ON FINAL JUDGMENT FILED MAY 18, 1995

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS MIDLAND-ODESSA DIVISION

STANLEY E. REED	)	
	)	
v.	)	**MO-94-CA-184**
	)	
CHEVRON PIPE LINE COMPANY	)	

ORDER ON FINAL JUDGMENT

BEFORE THE COURT, in the above-captioned cause of action, is Plaintiff's proposed Final Judgment and Defendant's Motion For Judgment As A Matter Of Law And Order For Conditional New Trial; And, Alternative Motion For New Trial. The Court is of the opinion that the Judgment, as submitted by Plaintiff, should be denied. The Court is further of the opinion that Defendant's Motion For Judgment As A Matter Of Law should be granted in part and denied in part. Defendant's other motions before this court, however, should be denied.

As to Jury Question Number One, the Court must determine, as a matter of law, if there was sufficient evidence brought forth in trial to support a finding of Age Discrimination, in violation of the Age Discrimination in Employment Act. In order to determine whether age discrimination was present in a case where there is no direct evidence of such discrimination, as in the instant case, the Plaintiff must establish a prima facie case of age discrimination. *See Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815

(5th Cir. 1993). In order to determine this, we must walk through a four step analysis. *Id.*

We must determine if the Plaintiff was: (1) Discharged; (2) qualified for the position; (3) within the protected age class — over 40 — at the time of discharge; and (4) replaced by someone outside of the protected age class — under 40 — or was otherwise discharged because of his age. *Id.* There seems to be no dispute over whether Reed meets the first three criteria. He does. As to the fourth criteria, concerning the first part, there was undisputed evidence at trial that the Plaintiff was replaced by another white male over the age of 40. Thus far all four of the criteria have been met. The question arises however, in the second part of number four. Was the Plaintiff otherwise discharged because of his age? The only evidence brought forth at trial was Reed's own assertion that he thought that age might have been a factor.[1] This assertion, with nothing else, is insufficient to make a prima facie case of age discrimination.

However, assuming Reed does establish his prima facie case, he establishes a rebuttable presumption that the employer unlawfully discriminated against him. *Id.* Chevron Pipe Line may then negate this presumption by articulating a legitimate, non-discriminatory reason for its action. *Id.* If the Defendant articulates a non-discriminatory reason for firing the Plaintiff, and produces sufficient evidence to support this reason, "the burden reverts to the [P]laintiff to prove that the employer's

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1. There was testimony from two other Chevron Pipe Line employees who also thought age may have been a factor in their being fired. These two employees however were fired one year after Reed's termination, and as part of a company wide layoff, and therefore their testimony on this issue is irrelevant.

reasons are pretextual."[2] In the instant case, the Defendant made a showing through the testimony of several witnesses that Reed was terminated from his employment for nondiscriminatory reasons; i.e. sexual harassment and violation of company policy and procedures. Therefore, the burden shifts back to the Plaintiff to show these stated reasons were pretextual.

"The [P]laintiff can show pretext by introducing evidence which proves that the reason[s] stated by the employer, 'though facially adequate, [were] untrue as a matter of fact, or [were], although true, a mere cover or pretext' for illegal discrimination."[3] As stated previously, the Plaintiff's only evidence of age discrimination was his mild assertion that he thought age might have been a factor. This does not meet the burden to show that Chevron Pipe Line's stated reasons for termination were pretext. Plaintiff's proof must consist of more than "a mere refutation of the employer's legitimate nondiscriminatory reason."[4] Here, the Plaintiff's only evidence is a 'mere refutation'; thus no pretext has been shown.

The Court therefore finds, as a matter of law, that the Plaintiff has not proven that Chevron Pipe Line violated the Age

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2. *Moore* citing *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 646 (5th Cir. 1985), which cited *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-55, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981).

3. *Moore* citing *Normand v. Research Inst. of Am., Inc.*, 927 F.2d 857, 859 (5th Cir. 1991) (quoting *Elliott v. Group Medical & Surgical Servs.*, 714 F.2d 556, 566 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984)).

4. Id. (citing *Hanchey b. Energas Co.*, 925 F.2d 96, 97 (5th Cir. 1990)).

Discrimination in Employment Act nor has the Plaintiff proven that he was a victim of age discrimination on the part of Chevron Pipe Line. This cause of action will therefore be disallowed. The amount of damages was not separated into two distinct money questions, by agreement of the parties, and is therefore indistinguishable as to the two claims and will consequently not be disturbed. Accordingly,

IT IS ORDERED that Plaintiff's proposed Final Judgment, as submitted, shall be DENIED.

IT IS FURTHER ORDERED Defendant's Motion For Judgment As A Matter Of Law shall be **GRANTED** as to the issue of Age Discrimination, as set forth above, and **DENIED** as to the remaining issues; and Defendant's Motion For Order For Conditional New Trial, And Alternative Motion For New Trial shall also be **DENIED**.

IT IS FURTHER ORDERED the remaining jury questions for the Judgment were:

QUESTION NUMBER TWO DO YOU FIND THAT THE DEFENDANT, CHEVRON PIPE LINE, ACTED WITH ACTUAL MALICE AND/OR IN RECKLESS DISREGARD IN ITS STATED REASONS FOR TERMINATION OF THE PLAINTIFF, STANLEY REED?

PLEASE ANSWER "YES " OR "NO" YES

QUESTION NUMBER THREE DO YOU FIND THAT THE DEFENDANT, CHEVRON PIPE LINE, MADE A

DEFAMATORY STATEMENT EITHER ORALLY OR IN WRITING, ABOUT THE PLAINTIFF, STANLEY REED?

PLEASE ANSWER "YES" OR "NO" YES

QUESTION NUMBER FOUR DO YOU FIND THAT THE DEFENDANT, CHEVRON PIPE LINE, COMMUNICATED OR PUBLISHED THE DEFAMATORY STATEMENT TO A THIRD PARTY?

PLEASE ANSWER "YES" OR "NO" YES

QUESTION NUMBER FIVE WHAT SUM OF MONEY, IF PAID NOW IN CASH, WOULD REASONABLY AND ADEQUATELY COMPENSATE STANLEY REED FOR THE DAMAGES HE SUSTAINED AS A RESULT OF THE DEFENDANTS' CONDUCT?

ANSWER IN DOLLARS AND CENTS, FOR DAMAGES, IF ANY, OR ANSWER "NONE."

ANSWER: $761,975.00

QUESTION NUMBER SIX WHAT SUM OF MONEY, AS AN AWARD OF PUNITIVE DAMAGES, WOULD BE REASONABLY APPROPRIATE TO SERVE AS A DETERRENT TO CHEVRON PIPE LINE FOR THEIR ACTIONS?

ANSWER IN DOLLARS AND CENTS, FOR DAMAGES, IF ANY, OR ANSWER "NONE."

ANSWER: $213.025.00

The total amount of the Judgment is $975,000.00.

IT IS FURTHER ORDERED that pre-judgment interest will not be added to the Judgment. Post-judgment interest will be allowed at the rate authorized by 28 U.S.C. § 1961. This will be calculated as of the date of this Judgment. Further, Costs will be assessed against the Defendant.

IT IS FINALLY ORDERED that counsel for Plaintiff submit an Affidavit listing his time and expenses the Court should consider for making a determination of Attorney's Fees. Counsel for Plaintiff shall submit this Affidavit within ten (10) days of the date of this Order.

SIGNED this 18th day of May, 1995.

s/ Lucius D. Bunton III
HONORABLE LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE